Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1439

THOMAS W. COHN, ET AL.,

Petitioners,

v.

CITY OF NORWALK PLANNING AND ZONING COMMISSION AND ROCK LEDGE CORPORATION

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

RESPONDENT ROCK LEDGE CORPORATION'S BRIEF IN OPPOSITION

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The Respondent, Rock Ledge Corporation, hereby opposes the Petitioners' prayer for a writ of certiorari filed on March 19, 1979, and respectfully requests that said petition be denied.

Opinion Below

The memorandum opinion of the Connecticut Superior Court for the Judicial District of Fairfield at Stamford is as yet unreported and is partially presented in Petitioners' Appendix B and partially in Appendix B hereto.

Jurisdiction

The petition for writ of certiorari erroneously claims that the jurisdiction of this Court is evoked under 28 U.S.C. Sec. 1254(1), which deals with petitions to Federal Courts of Appeals and not to State Courts. This petition involves a final determination by the highest Court of the State of Connecticut and not a Federal Court of Appeals. Jurisdiction should have been invoked pursuant to 28 U.S.C. Sec. 1257(3). For this reason alone, the petition should be dismissed.

Questions Presented

WHETHER PETITIONERS CAN BE HEARD TO COMPLAIN ABOUT ACTION TAKEN BY THE COMMISSION FAVORABLE TO THEM AND DETRIMENTAL TO THE APPLICANT-RESPONDENT?

WHETHER PROPONENTS AND OPPONENTS WHO WERE HEARD OVER TWO DAYS WERE PROVIDED WITH A FAIR HEARING?

WHETHER THE CONNECTICUT SUPREME COURT VIOLATED THE PETITIONERS RIGHTS TO DUE PROCESS BECAUSE IT DID NOT STATE REASONS FOR ITS DENIAL OF CERTIFICATION OF THE PETITIONERS' APPEAL?

Constitutional Provisions, Statutes and Regulations Involved

The judgments of the Courts below violated no rights of Petitioners under the United States Constitution or its amendments. Other statutes and rules are set forth in Appendix A hereto.

Statement of the Case

This case involves an appeal from a routine zone change application granted by the Respondent Norwalk Planning and Zoning Commission to the Respondent Rock Ledge Corporation by a small group of area residents who were unhappy with the Commission's decision. There are no substantial Federal questions raised by the Petitioners that would merit review by this Court. In essence, the Petitioners are attempting to have this Court review a local zoning case that was decided by the Court below on principles well settled in the State of Connecticut by alleging their constitutional rights were violated.

The property involved is a 15.48 acre tract located in Norwalk, Connecticut, and bounded on three and a half sides by highways. At the time the Respondent Rock Ledge Corporation's application for change of zone was filed, the property was zoned for Residential use. It had not been used for Residential purposes since 1944. Shortly after World War II, the premises were used as an executive office for a major corporation despite the Residential zoning. Between 1963 and 1975, the property was used by a private girl's school. When the school moved away, the property was purchased by the Respondent Rock Ledge Corporation with the express purpose of again using it for an executive office.

An application was filed on December 1, 1976, to change the

zoning from Residential to an R-D Zone which would permit executive office use, and a hearing was held on said application on the evenings of January 12 and 13, 1977. Most of the surrounding landowners and the only abutting landowner went on record in favor of the proposal. At the commencement of the hearing, the Chairman of the Respondent Norwalk Planning and Zoning Commission announced the procedure to be followed which was to allow the applicant to be heard first together with any supporters, the opponents would be heard second and any rebuttal to follow. The Chairman stated at the commencement of the meeting, "All citizens and taxpayers of Norwalk are welcome and allowed to speak . . . Also I would like you to know that we will not have a so-called show of hands or a voice vote tonight. We are interested only in the evidence to be presented by individuals." (Transcript, meeting of January 12, 1977, p. 2). The meeting started shortly after 8:00 p.m. and the proponents finished their formal presentation before 10:00 p.m. (Transcript, meeting of January 12, 1977, p. 25).

The Petitioners, most of whom appeared at the January 12 and 13 hearing, were then and now represented by the same counsel who made no objection to the procedure which included the requirement that anyone who wished to speak should sign a list that was available at the entrance to the auditorium. After the Respondent Rock Ledge Corporation and its supporters finished their presentation, the Petitioners commenced their presentation with the guidance of counsel. (Transcript, meeting of January 12, 1977, p. 44). The opponents' statements went on into the early hours of the morning and the Chairman adjourned the meeting to the following evening. The next evening the opponents continued their case which ran until midnight. The Respondents rebutted the opponents in approximately 10 minutes.

One of the main objections of the Petitioners at the two-night hearing was that the R-D Zone regulations were inadequate. Between the time of the public hearing on the zone change and the decision to change the zone, the Respondent Norwalk Planning and Zoning Commission adopted many of the recommendations of the Petitioners and stringently tightened the regulations which applied to the R-D Zone, all to the detriment of the Respondent Rock Ledge Corporation and others similarly situated. It did so only after holding a public hearing properly noticed on the proposed regulations at which the Petitioners and their counsel appeared and were fully heard.

After the regulations were so amended, the Respondent Norwalk Planning and Zoning Commission changed the zone of the Respondent Rock Ledge Corporation's property from Residential to R-D Zone. The Petitioners took an appeal from this action and from subsequent actions of the Planning and Zoning Commission and from the Connecticut State Traffic Commission which granted permits to the Rock Ledge Corporation to construct an office building. The Court below heard all cases together and issued a judgment in favor of the Respondents in all cases. The Petitioners then attempted to obtain certification to the Supreme Court of Connecticut in all cases which were denied. The Petitioners are pursuing this writ of certiorari in the zone change only.

Reasons For Denying The Writ

Certiorari should be denied in this case because there are no substantial Federal questions involved.

I.

Where the petitioners have had a full and fair hearing, they cannot be heard to complain that the zoning commission amended the zoning regulations in a manner favorable to the petitioners and to the detriment of the applicant-respondent.

The first question raised by the Petitioners for review by this Court is whether they were deprived of an adequate hearing with respect to the Respondent Rock Ledge Corporation's zone change application by reason of the amendment of the provisions governing development of an R-D Zone subsequent to the hearing on the application and prior to the effective date of the zone change. There is no question, and the Petitioners do not dispute the fact that all of the changes to the R-D Zone regulations were in direct response to their underlying complaints with respect to the zone change and that the amended regulations imposed substantial new restrictions upon the nature and scope of development of R-D zoned property. Nor is there any question that the regulation amendments were separately and properly noticed, that a full hearing was held with respect to them on March 16, 1977, and that a number of Petitioners and their attorney actively participated in the hearing, addressed the question again of the advisability of granting the zone change application in this hearing, and currently evidenced an understanding that the new, more stringent zoning regulations were to be applied to the Rock Ledge Corporation's property.

It is fundamental that a zoning commission has the legislative power to change its regulations at any time. *A. P. & W. Holding Corporation v. Planning and Zoning Board,* 167 Conn. 182, 184, 355 A.2d 91 (1974). The notice of hearing is not required to contain an accurate forecast of the precise action ultimately taken upon the subject matter referred to in the notice. 1 Rathkopf,

Zoning and Planning, Section 10.03 et seq. (4th ed. 1975); *Neuger v. Zoning Board,* 145 Conn. 625, 630, 145 A.2d 738, 742 (1958).

The Courts of this nation are replete with decisions that where the result differs insubstantially from the hearing notice or, and more pertinent to this case, where regulations are adopted or a result is obtained which differs from the proposal in a manner favorable to the opponents and detrimental to the applicant, opponents' later claims of unfair hearing will not be sustained. *Heaton v. City of Charlotte,* 277 N.C. 506, 178 S.E. 2d 352 (1971) (change favorable to the complaining parties); *Klaw v. Pau-Mar Construction Company,* 11 Terry 487, 50 Del. 487, 135 A.2d 123 (1957) (smaller areas rezoned for apartment from single-family use); *St. Bede's Episcopal Church v. City of Santa Fe,* 85 N.M. 109, 509 P.2d 876 (1973) (3.6 acres proposed to be rezoned from Residential to Commercial and after hearing 2.7 acres actually rezoned); *Kalvaitis v. Village of Port Chester,* 235 N.Y.S. 2d 44 (1962) (changes made by Commission increasing burden upon the owner as against the proposed notice); *McGee v. City of Cocoa,* 168 So. 2d 766 (Fla. App.) (1964) (lesser change of zone than that requested and published in the notice of hearing — plaintiffs in attendance).

The Court below was entirely correct in concluding that *Neuger v. Zoning Board,* 145 Conn. 625, 145 A.2d 738 (1958) wholly disposed of the plaintiffs' argument. In *Neuger,* plaintiffs, aggrieved property owners adjoining a shopping center, similarly contended that changes in a proposed zoning amendment regulating the location of package stores in shopping centers, which changes had been effected subsequent to the hearing on the amendment, were improperly enacted and should have been accorded a second public hearing prior to enactment. As in the

instant case, the amendments were largely responsive to the complaints raised by the plaintiffs in the public hearing. In rejecting plaintiffs' claim of deprivation of due process, the Court soundly reasoned that:

> The changes in the language of the amendment as a result of the views expressed at the hearing did not effect the sufficiency of the notice or the validity of the hearing. The very purpose of the hearing was to afford an opportunity to interested parties to make known their views and to enable the board to be guided by them. It is implicit in such a procedure that changes in the original proposal may ensue as a result of the views expressed at the hearing. *Couch v. Zoning Commission,* 141 Conn. 349, 358, 106 A.2d 173; *Pecora v. Zoning Commission,* 145 Conn. 435, 444, 144 A.2d 48 *Klaw v. Pau-Mar Construction Co.,* 50 Del. (11 Terry) 487, 135 A.2d 123.

145 Conn. at 630.

If anything, the instant case is even less appropriate than *Neuger* for a claim of deprivation of due process, since *no* change was made to the actual request for a zone change between notice and approval. All that was changed were regulations pertaining to the R-D Zone requirements, which amendment was separately noticed and accorded a hearing, in which Petitioners actively participated, with full awareness that the new regulations were to affect the Rock Ledge Corporation's property. The Petitioners' active participation in such hearing is not to be overlooked in considering the soundness of their claim for aggrievement. Cf. *MacKenzie v. Town Planning & Zoning Commission,* 149 Conn. 678, 684, 183 A.2d 619 (1962). The Petitioners' rights to a fair hearing were not violated.

II.

The public hearing was held in an orderly and fair manner and did not violate due process.

An opportunity for hearing is one of the essential elements of due process. *Shields v. Utah Idaho C.R. Co.,* 305 U.S. 177 (1938). If reasonable opportunity for hearing is afforded a person sought to be affected by a proceeding, then he has had due process. *Lynde v. Lynde,* 181 U.S. 183 (1901).

The public hearing was held on January 12 and 13, 1977, and afforded proponents and opponents their fair hearing and was not violative of due process. Many hours were devoted to oral presentations, and each side was allowed to fully develop the issues. During the trial, plaintiff Betsy Palmer testified at one point as follows:

> "Q. And did you ask the Chairman whether or not you could speak at that hearing?
>
> A. Actually what it was, I came to the meeting and Grace Lichtenstein, and I talked to her prior to the meeting and she came and met . . . ."
> (Transcript, p. 629).

The Court then sustained an objection as to what Grace Lichtenstein said on the ground of hearsay. Later plaintiff Betsy Palmer claimed that she made a request to the Commission to allow her to speak and, "they said that they had enough names on the list and were not accepting anymore." She stated that she had not signed the speakers list even though she was there the previous night. This confusing bit of testimony appears to be the

basis for the second issue raised by the Petitioners.

An examination of the entire record of the hearing before the Planning and Zoning Commission on January 12 and January 13, 1977, fails to disclose where anyone was denied the right to speak, particularly any plaintiff and most particularly Betsy Palmer. In fact, at page 37 of the transcript for the first night of the hearing we find the following statement by the Chairman of the Respondent Planning and Zoning Commission:

> "Mr. Canevari: If we get to the point where people really have to go home, we will come back tomorrow night, everyone has to have a chance. That is America, that is democracy and that is the way we work."
> (Transcript, meeting of January 12, 1977, p. 37).

As the Trial Court observed from the record before it, the procedure followed by the Commission in establishing proponents lists and opponents lists was a reasonable one under the circumstances in view of the large number of persons attending the hearings and wishing to be heard. The Commission was acting in a legislative capacity. *Loh v. Town Planning and Zoning Commission,* 161 Conn. 32, 282 A.2d 894 (1971). The Commission is not bound by procedural rules governing judicial and quasi-judicial hearings. *Wadell v. Board of Zoning Appeals,* 136 Conn. 1, 68 A.2d 152 (1949). As the Court observed in its memorandum, the plaintiff who claimed that she was denied an opportunity to speak, clearly testified that she would have said the same things that she had said in her letter which was on record with the Commission by the time of the hearing. When, at the trial plaintiff Palmer was

given her letter written to the Commission she was asked, "and were those the thoughts that you would have expressed to the Planning and Zoning Commission." Her answer was, "I undoubtedly would have said these things yes. I probably would have said more. I probably would have gone on more emotionally . . . ." (Transcript, p. 636).

It is submitted that Betsy Palmer had every opportunity to speak at the January 12 and 13 meetings if, indeed, she was present. The record is barren of any suggestion that she attempted to obtain permission from the Commission to speak and was denied. However, even if this was the case, the effect was harmless inasmuch as she had already put her views forward in a letter to the Commission and further, those same views had been covered many, many times by others of the number approximating 40 people who did speak in opposition to the proposal.

III.

Generally, Appellate Courts are not obliged to state their reasons for denial of Certification or Certiorari.

Petitioners had a full appeal to the lower Courts of Connecticut pursuant to Section 8-8 of the Connecticut General Statutes. The statute provides in part that appeals from the doings of administrative agencies shall be taken to the Superior Court of Connecticut as was done in this case. The statute further provides that, "There shall be no right to further review except to the Supreme Court by certification for review, upon the vote of two judges of the Supreme Court so do certify and under such other rules as the judges of the Supreme Court establish." There is no Connecticut statute or rule requiring the Justices of its Supreme Court to state on the record its reasons for either granting or

denying certification anymore than there is any requirement that the Justices of the Supreme Court of the United States set forth in each and every case their reason or reasons for granting or denying a writ of certiorari. "Certification by the Supreme Court on petition is not a matter of right but of sound judicial discretion and will be allowed only where there are special and important reasons therefore. . . ." Connecticut Practice Book Section 3137. The Petitioners claim that their due process rights to appellate review were prejudiced because Connecticut Supreme Court did not state any reasons for its denial of certification is without merit.

CONCLUSION

This is a routine zoning case. A small group of persons living near and far from the property were unhappy with the result and have taken successive appeals. None of the three questions posed in the petition for writ of certiorari are substantial or even serious Federal questions. Indeed, petitioners do not even claim that they are substantial Federal questions, but merely point out that they made "constitutional claims" during various proceedings below. The petition for writ of certiorari to the Supreme Court of the State of Connecticut should be denied.

Respectfully submitted,

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April 16, 1979

APPENDIX A

[Statute and Connecticut Practice Book Rule Cited]

(1)

CONNECTICUT GENERAL STATUTES

§ 8-8. Appeal from board to court. Review by supreme court.

... The provisions of chapter 902 to the contrary notwithstanding, there shall be no right to further review except to the supreme court by certification for review, upon the vote of two judges of the supreme court so to certify and under such other rules as the judges of the supreme court establish. The procedure on such appeal to the supreme court shall, except as otherwise provided herein, be in accordance with the procedures provided by rule or law for the appeal of judgments rendered by the superior court unless modified by rule of the judges of the supreme court.

(2)

CONNECTICUT PRACTICE BOOK RULES

§ 3137. Basis for Certification.

Certification by the supreme court on petition is not a matter of right but of sound judicial discretion and will be allowed only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicates the character of the reasons which will be considered:

(1) Where the court below has decided a question of substance not theretofore determined by the supreme court or has decided it in a way probably not in accord wih applicable decisions of the supreme court.

(2) Where the decision under review is in conflict with other decisions of the court below.

(3) Where the court below has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by any other court, as to call for an exercise of the supreme court's supervision.

(4) Where a question of great public importance is involved.

(5) With respect only to appeals from the appellate session, where the judges of the appellate panel are divided in their decision or, though concurring in the result, are unable to agree upon a common ground of decision.

APPENDIX B

[Judgment and Proceedings Below]

(1)

NO. 19151 L

THOMAS W. COHN, ET AL : SUPERIOR COURT
vs. :
CITY OF NORWALK PLANNING
COMMISSION, ET AL :

NO. 19849 L JUDICIAL DISTRICT
OF FAIRFIELD

THOMAS W. COHN, ET AL :
vs. :
CITY OF NORWALK PLANNING
& ZONING COMMISSION, ET AL : AT STAMFORD

NO. 20023 L

THOMAS W. COHN, ET AL
vs. NOVEMBER 14, 1978
STATE TRAFFIC COMMISSION,
ET AL

MEMORANDUM OF DECISION

. . . A local commission should have reasonable flexibility in allowing a small, carefully regulated industry (research and development) to exist in one section of town which will preserve the rural, residential character of the entire town and that decision should be resolved by the town's legislative body which has the

responsibility and authority to determine the course of zoning needs, without interference by the courts. *Jablon v. Town Planning & Zoning Commission of Newtown,* 157 Conn. 434, 254 A.2d 914 (1969). Its decision to amend the town's zoning regulation cannot be considered spot zoning even if it singles out a relatively small piece of land and its decision should not be disturbed unless its action is clearly contrary to a rational development of a comprehensive plan, particularly where it appears from a lengthy record that the judgment of the Commission was reasonably, fairly and honestly reached after giving consideration to the public welfare. *Jablon v. Town Planning & Zoning Commission of Newtown,* supra.

Based on the transcript, and all of the Exhibits in Case Number 1, the change in zone adopted by the Commission promotes the general welfare in a reasonable manner and the reasons for such change are reasonably and fairly supported by such evidence. . . .